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In the
Supreme Court of the United States

OCTOBER TERM 1961

No. 372 / 31

L. D. RAGAN, *Appellant*,
vs.
CITY OF SEATTLE, *Appellee*,
WASHINGTON MUSIC MERCHANTS, INC.
Intervening Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

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THE ARGUS PRESS, SEATTLE, WASHINGTON

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Motion of Appellee City of Seattle to Dismiss

Appellee, The City of Seattle, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss the appeal in the above entitled case on the ground that the appeal does not present a substantial federal question.

STATEMENT OF CASE

During 1957 and 1958 the legislative authority of The City of Seattle was advised of criminal activity in the form of threats of physical violence and interference with business establishments in Seattle by persons interested in the ownership and operation of coin-operated mechanical music machines also referred to herein as "juke boxes" (R. 21). Acting on said advice Ordinance 87384 was enacted on July 24, 1958, amending certain sections of the general licensing ordinance of

Seattle (Ordinance 48022) to meet the problem. Said Amending Ordinance established the following limitations upon "juke box" operation in the city:

1. Forbade the transfer of any such machine location license without approval of the City Council by Resolution.

2. Prohibited the acquisition of any financial interest in the premises where a "juke box" was located by any manufacturer, holder of a mechanical music machine operator's license, or by the holder of a wholesale vendor's license.

3. Set a maximum size upon the operation of any one operator at 150 location licenses, which number constituted a 33% operating margin over the then largest single operation of 111 machines (R. 22).

4. Restricted for the time new entrants into this activity by permitting only one licensee per ten thousand population.

Appellant is a tavern owner desirous of owning the coin-operated mechanical music machine which he chooses to maintain in his tavern. Under Ordinance 87384 appellant is precluded from acquiring such an ownership interest as is the case with all individuals in the City desirous of owning such machines, with the exception of approximately 40 individuals who were "juke box" licensees at the time that amending Ordinance 87384 was passed. Appellant sought declaratory relief in the Superior Court, then appealed to the Supreme Court of the State of Washington which court in its decision reported at 58 Wn.(2d) 779, 364 P.(2d) 916 determined that appellant could be prospectively

denied the opportunity to own a "juke box" commercially, as an incident to a legislative limitation upon the number of "juke boxes," "juke box" operators and their operations, if such limitation is reasonably necessary to prevent coercive tactics involving threats of physical violence and interference with other lawful businesses by competing "juke box" operators (in addition to the ordinary and widely recognized obnoxious aspects of "juke boxes," *e.g.* noise-nuisance, an accessory for reproduction of obscene recordings, etc.), all in the interest of protecting the public peace and safety.

I. The Ordinance Does Not Violate the Due Process or Equal Protection Clauses of the Federal Constitution.

Confronted with the conditions stated the means adopted by the legislative authority of The City of Seattle, and in due course upheld by the Superior Court and the Supreme Court of the State of Washington, were reasonably related and directed to the object of preventing expansion of the "juke box" business or increase in number of "juke boxes," restricting coercion by competing professional operators, meanwhile avoiding divestment of any persons with property or livelihood dependent upon the business of such property or livelihood.

The ordinance deters efforts to compel lessees by improper methods to transfer their patronage by requiring approval of location transfers by the City Council. The ordinance in question sets a maximum size upon the operations of any single operator at 150 machines, which number constituted a 33% operating margin

upon the largest operator at the time of the enactment (R. 22). By thwarting new starts in the business and by limiting the eventual size of any one operation, in the presence of knowledge that nearly all owner-operators (single machine owners) would never be otherwise, the legislative authority calculated the gradual decline of "juke box" operations.

The object of the challenged ordinance is a proper subject for exercise of the police power of The City of Seattle, and the object being proper, the means employed bears a reasonable relation to its attainment, and is no failure of legislative due process.

If there is a reasonable basis for classification it is not ground for objection that during the progress of limitation one class continues while the other is denied. *Goesart v. Cleary* (1948) 335 U.S. 464, 93 L.ed. 163, 69 S.Ct. 198.

Appellee contends that the City's legislative authority exercising its police power by ordinance pursuant to its charter adopted under the provisions of Art. XI, Sections 10 and 11 of the Washington constitution, may prohibit "juke boxes" outright on the basis that such devices present a police problem arising out of the purveyance of obscene recordings, frequent nuisances and lately certain aspects of criminal conduct (R. 21). Appellee submits the following judicial authority in support of prohibition of "juke boxes": *Raymond v. Village of River Forest* (1953) 350 Ill. App. 80, 111 N.E.(2d) 848; *Zinn v. City of Steelville* (1943) 351 Mo. 413, 173 S.W.(2d) 398. If the city may do so, it may, *a fortiori*, restrict the number and man-

ner of their operation so long as there is a reasonable basis for the regulation and any resulting distinction between classes created thereby.

With reference to appellant's contention that the limitation of 150 "juke boxes" per licensee is no limitation at all (since 150 times the existing number of licenses would have amounted to approximately 10,000 machines, whereas only 1,009 were extant in the city at the date of enactment) and hence only a mask for "invidious discrimination" it is significant appellee submits that between the date of enactment of Ordinance 87384 and the decision below the largest single operation in Seattle had declined from 111 to 84, the number of both single and professional operators has been reduced and the total number of "juke boxes" in Seattle had declined from 1,009 at time of the enactment of Ordinance 87384 to 939 at the time of the commencement of this action (R. 22). The controversy seems at root to be over appellant's refusal to concede to the legislative authority of Seattle the power to legislate on the basis of its knowledge that existing single machine owner-operators, nearly all of them small tavern or restaurant proprietors, would not suddenly expand to 150 machine licensees, which is the fact.

The facts surrounding the enactment of Ordiance 87384 are not disputed, and such facts so clearly meet the requirement of *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392, 71 L.ed. 1115, 37 S.Ct. 630, that further review of the general legal principles involved in this appeal can serve no constructive purpose.

The Federal Questions Presented Are Not Substantial

With reference to the questions appellant presents, all have been answered by the decisions of the court in the following cases:

With reference to appellant's Question No. 1 (a) and (b), by *Ohio ex rel. Clarke v. Deckebach* (1927) 274 U.S. 392, 71 L.ed. 1115, 37 S.Ct. 630; *Murphy v. California* (1911) 225 U.S. 623, 56 L.ed. 1229, 32 S.Ct. 697.

With reference to appellant's subparagraph (c) by *Crescent Cotton Oil Co. v. Mississippi* (1921) 257 U.S. 129, 66 L.ed. 166, 42 S.Ct. 42. In this appeal, as in the case above cited, the court below credited the legislative authority with cognizance of a distinction which in fact existed, in this instance between the single machine owner-operator and the multiple machine "professional" operator, as such distinction relates to the validity of the numerical limitation (150 machines per licensee) upon "juke boxes" although such distinction is not referenced by the language of the ordinance.

With reference to appellant's question No. 2, by *New York ex rel. Lieberman v. Van De-Carr* (1905) 199 U.S. 552, 50 L.ed. 305, 26 S.Ct. 144, and by the express abstention from determination of this question by the Supreme Court of the State of Washington.

CONCLUSION

Appellant raises neither new nor substantial federal questions, as contemplated by Title 28, United States Code, Section 1257 (2), the basic legal principles having been well established by *Murphy v. California* (1911) 225 U.S. 623, 56 L.ed. 1229, 32 S.Ct. 697, and

Ohio ex rel. Clarke v. Deckebach (1927) 274 U.S. 392, 71 L.ed. 1115, 37 S.Ct. 697.

Appellee therefore moves the Court to dismiss this appeal.

Respectfully submitted,

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